

- (3) Whether timely written claim was served on the respondent.

In regard to the issue of timely written claim, the respondent in his brief filed in support of his argument on November 29, 1994, admitted that timely written claim was served on the respondent, if the date of accident was found to be sometime within the last two weeks of December 1993.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review this preliminary hearing order as the issues raised by the respondent are issues specifically enumerated in K.S.A. 44-534a(a)(2) as jurisdictional and subject to the Appeals Board review.

(1) In order for claimant to receive compensation benefits, she has the burden of proving her right to such benefits by establishing the various conditions on which her right depends. See K.S.A. 44-501(a). This has to be accomplished by persuading the trier of facts by a preponderance of credible evidence based on the whole record. See K.S.A. 44-508(g). In the instant case, the Administrative Law Judge found that as to the issue of whether or not the claimant suffered a personal injury by accident that arose out of and in the course of her employment, the claimant had sustained her required burden of proof. The Appeals Board, however, after a careful examination of the whole record, for the reasons set forth below, finds that the claimant has not sustained her burden of proof in reference to this issue. The claimant's evidence that was presented at the preliminary hearing, taken as a whole, is not persuasive or credible in that it is inconsistent and not substantiated by medical reports.

The claimant first claims on her Application for Preliminary Hearing (Form E-3) a work-related injury occurring on September 27, 1993. An employment accident worksheet entered into evidence at the Preliminary Hearing was received by the respondent on June 28, 1994, claiming a date of injury of March 18, 1994. Another date of accident is alleged by the claimant during her preliminary hearing testimony that her low back injury occurred sometime in the last two weeks of December 1993. The last two weeks of December 1993, is the date of accident that is finally argued by the claimant and will be used by the Appeals Board in deciding this appeal. Claimant also testified that she notified her supervisor, James Hill, that she injured her back in December 1993, while at work.

The claimant testified that the incident that occurred in December of 1993, was so severe that the pain resulted in her not being able to move. However, she was able to work for the respondent from December of 1993, through March 18, 1994, before she sought medical treatment for low back pain on March 19, 1994. At that time she was treated for back and leg pain by Dr. Robert Thomas at the Emergency Care Services, at St. Joseph Medical Center, Wichita, Kansas. He treated her on March 19, 1994, April 5, 1994, and April 7, 1994. St. Joseph Medical Center medical records do not indicate that claimant's back problems were related to an accident that occurred while she was working for the respondent. After an MRI, the claimant was referred to Eustaquio Abay, II, M.D., an orthopedic surgeon on May 19, 1994, who diagnosed left L5-S1 radiculopathy, secondary to L4-5 and L5-S1 herniated disk. At that visit, the claimant, for the first time, described an incident while working for respondent several weeks earlier that caused her

severe pain in the low back. However, Dr. Abay's medical records do not contain an opinion that such incident had any causal connection with her herniated disks. Dr. Abay on May 25, 1994, performed surgery on the claimant's back to relieve her from the residual affects of the herniated disks. The claimant did not make a claim that her back problems were work-related until June 28, 1994, when she filed with the respondent an emergency accident worksheet. This was over a month after her back surgery.

(2) With respect to the issue of timely notice, the Appeals Board finds the claimant's testimony that she notified her supervisor, James Hill, of her alleged accident in December of 1993 is not credible and persuasive. A statement from Mr. Hill was entered into evidence at the preliminary hearing stating he was not notified by the claimant that she suffered an accidental injury to her back at work. The Appeals Board finds the first notice the respondent had that claimant suffered a work-related injury was June 28, 1994, when the claimant filed with respondent an emergency accident worksheet. Since more than seventy-five days (75) had elapsed from the date of the accident, the claimant is barred from maintaining a claim for compensation. See K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark, dated October 20, 1994, is reversed and the claimant is denied benefits against the respondent and its insurance carrier for an alleged injury occurring sometime within the last two weeks of December of 1993.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Curtis Perry, Attorney at Law, Wichita, KS 67202
Mark T. Schoenhofer, Attorney at Law, Wichita, KS 67207
Cortland Clotfelter, Attorney at Law, Wichita, KS 67202
John D. Clark, Administrative Law Judge

MARY OTT

4

DOCKET NO. 189,677

George Gomez, Director